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IN THE

Supreme Court of the United States

October Term, 1939.

No. 272

NATIONAL LICORICE COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ABRAHAM MANN,
EDWARD M. LADDEN,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
A. Statement of the Matter Involved	1
B. Jurisdiction	8
C. Questions Presented	8
D. Reasons Relied on for the Allowance of the Writ	10
I. Opinions Below	15
II. Jurisdiction	15
III. Statement of the Case	16
IV. Specification of Errors	16
V. Argument	18
POINT I—There is a conflict between Circuit Court decisions as to the extent of the Board's jurisdiction over matters not included within a charge filed under Section 10(b) of the Act; an important question is thus presented which should be settled by this Court	18
POINT II—The decision of the Court below that neither the Committee nor petitioner's employees were entitled to notice and hearing of the proceedings which resulted in cancellation of their contracts is in conflict with the rule announced in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, and other cases decided by this Court	21
POINT III—The cancellation of the contracts was effected without due process of law in view of the stipulation of counsel that such contracts were not in issue	26
POINT IV—The recognition by the Circuit Court of the existence of authority in the Board to pass upon and supervise the terms of an employment agreement conflicts with the decision of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1	28

PAGE

POINT V—By enforcing the Board's order cancelling the contracts, the court below gave judicial approval to the proposition that the Board possesses such power, thereby creating a conflict with the decision of this Court in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197.. 31

POINT VI—The finding of domination over the Committee reached in this case was not based on substantial evidence; other Circuit Courts have declared similar factual situations to be no evidence of domination..... 32

Conclusion 36

Appendix 37

TABLE OF CASES CITED

Chesapeake & Ohio R. R. Co. v. Martin, 283 U. S. 209 30

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 231-239, 59 S. Ct. 206, 83 L. Ed. 11, 16, 21, 22, 23, 24, 30, 31, 33

Coppage v. Kansas, 236 U. S. 1..... 22

Employers Reinsurance Corp. v. Bryant, 299 U. S. 374, 381, 81 L. Ed. 289, 293..... 24

Morgan v. U. S., 304 U. S. 1, 22, 58 S. Ct. 773, 778.... 28

National Labor Relations Board v. A. S. Abell Co., 97 Fed. (2d) 951 (C. C. A. 4th).....33, 34

National Labor Relations Board v. Delaware-New Jersey Ferry Co., 90 Fed. (2d) 520 (C. C. A. 3rd), certiorari denied Nov. 8, 1937.....11, 29

National Labor Relations Board v. Hopwood Retinning Co., Inc., 98 Fed. (2d) 97 (C. C. A. 2nd)....11, 19, 20

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45, 57 S. Ct. 615, 628, 9, 11, 20, 28, 29

PAGE

National Labor Relations Board v. *Lion Shoe Company*, 97 Fed. (2d), 448 (C. C. A. 1st) 34

National Labor Relations Board v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 58 S. Ct. 571, 82 L. Ed. 831, 115 A. L. R. 307 ..... 16, 21, 23

National Labor Relations Board v. *The Sands Mfg. Co.*, 96 Fed. (2d) 721 (C. C. A. 6th) 11, 29

Washington, Virginia & Maryland Coach Co. v. *National Labor Relations Board*, 301 U. S. 142, 147 33

OTHER AUTHORITIES CITED:

Constitution of the United States, Fifth Amendment 9

Judicial Code, as amended by the Act of February 13th, 1925, c. 229, sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347(a)) 8, 15

National Labor Relations Act (Act of July 5th, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A., Secs. 151 *et seq.*) 1, 7, 8

Section 8, subsections (1), (2) and (5) 2

Section 9(a) 33

Section 10(b) 2, 10, 18, 19

Section 10(e) 2, 8, 15

Revised Rules of United States Supreme Court, Section 5, subdivision (b) of Rule 38 8

Rules and Regulations of the Board, Series 1, as amended, Article II, Section 1 ..... 10, 18

21 Corpus Juris, Equity, Sec. 277 25

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October Term, 1939.

No.

NATIONAL LICORICE COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

National Licorice Company, the petitioner herein, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals, for the Second Circuit (R. 914), entered in the above cause on July 6th, 1939, upon its decision (R. 907) rendered June 12th, 1939, modifying and enforcing as so modified the order of the National Labor Relations Board made against petitioner herein.

A.

STATEMENT OF THE MATTER INVOLVED.

Petitioner is a New York corporation engaged in the manufacture and sale of licorice and related products. On August 2nd, 1937, proceedings against petitioner were instituted under the National Labor Relations Act (Act of July 5th, 1935, c. 372, 49 Stat. 449,

29 U. S. C. A. Secs. 151, *et seq.*) through the filing of a sworn charge under Section 10(b) of said Act by Bakery & Confectionery Workers International Union of America, Local Union 405, Greater New York and Vicinity, charging petitioner with the commission of unfair labor practices under Section 8, subsections (1), (2) and (5) of said Act (R. 772). On October 7th, 1937, the National Labor Relations Board issued its complaint and notice of hearing (R. 774-782), to which petitioner filed an answer (R. 790-798). The hearing was held before the Trial Examiner who filed his Intermediate Report (R. 804-828), to which petitioner filed exceptions (R. 829-836), and thereafter, on May 31st, 1938, the Board rendered its Decision and Order (R. 867-897) finding petitioner guilty of unfair labor practices under Section 8, subsections (1), (2) and (5) of the Act, and directing it to cease and desist from engaging in certain alleged practices and to take certain affirmative action which the Board found would effectuate the policies of the Act (R. 894-897).

Thereafter, the Board petitioned the Circuit Court of Appeals, for the Second Circuit, for enforcement of its Order pursuant to Section 10(e) of the Act, and after hearing argument, the Circuit Court rendered its decision (R. 907) modifying the Board's Order in one respect and enforcing the remainder thereof.

The essential facts are as follows: The petitioner employed approximately 140 employees at its Brooklyn plant during the period in which this controversy arose. On August 2nd, 1937, the employees went out on a strike which lasted until August 25th, 1937, during which interval petitioner stopped all operations (R. 338). There was evidence submitted at the hearing that many employees, not being in sympathy with the

strike, tried to resign from the union and return to work, but were fearful of violence at the hands of the union (R. 521-524). On August 25th, 1937, the plant reopened and the employees gradually returned to work until by September 20th, 1937, all employees, with the exception of two who never applied for their jobs (R. 340, 568), were taken back regardless of their union membership or union activities (R. 568).

On August 27th, 1937, Walter J. Healey, petitioner's assistant secretary, was requested by a group of employees to confer with them at the Y. M. C. A. (R. 525). He did so and was informed that the employees were resentful of the treatment accorded them by the union, were desirous of giving up the strike, returning to work and forming their own bargaining organization (R. 526). Healey replied that their jobs were open to them but that before the company could deal with any representatives of employees, such representatives must obtain "the authorization of 51%" (R. 527).

On September 9th, 1937, Healey was informed by the employees that they had elected, from among their number, a bargaining committee of eight persons who desired to present some requests to the company officials (R. 577). Petitioner had taken no part whatever in the formation or selection of this committee which was created solely by the employees themselves, without suggestion, instigation or influence of the management (R. 579).

Petitioner, however, refused to deal with this committee unless it could supply written proof that it duly represented the employees (R. 576; 725). Bill McCann, one of the committee members, asked Healey for assistance in drawing up such a letter or form. He was referred to Mr. Sanford, petitioner's presi-

dent, who, on September 9th, 1937, prepared a form of petition for the use of the employees, which, when executed by a majority, would constitute the written proof of authorization insisted upon by petitioner (R. 576).

On September 10th, 1937, the petition which had been drawn by Sanford at McCann's request, was presented to the company's officials, said document being signed by the eight members of the committee and by 118 of the 140 employees; constituting over 85% of all (R. 579-580). At the hearing conducted by the Board this petition was admitted into evidence without objection as Respondent's Exhibit 10 (R. 866a), and because of its importance to the questions of law involved in this proceeding, is set forth below in full, except that signatures are omitted.

"September 9, 1937.

National Licorice Company,
106 John Street, Brooklyn, N. Y.

Attention: Mr. D. D. Sanford, President

Gentlemen: We, the undersigned employees of the National Licorice Company, hereby notify you that we have this day elected a committee of our fellow workers, whose signatures are affixed hereto, as our representatives in collective bargaining with you. We authorize these representatives to enter into and sign a contract with the employer provided it contains substantially the provisions outlined to us by the Management.

You are also notified that the authority given to our fellow workers to represent us in collective bargaining supersedes any authority that any of the undersigned may have given to any other group, organization or individual, and no one

except the collective bargaining committee consisting of our fellow workers is authorized to represent us in collective bargaining.

Very truly yours,"

On the same day, September 10th, 1937, the committee, on its own volition, appeared at petitioner's office and conferred with the company's officials for two hours (R. 697) on the terms of the proposed contract. The committee, on behalf of all the employees, requested an increase of wages (R. 581), pay for all holidays (R. 583), establishment of piece-work rates high enough to equal hourly rate earnings (R. 706) and the reduction of the hours of firemen and maintenance men from 54 to 44 (R. 708).

After discussion (R. 583), the committee accepted petitioner's offer of a 5% increase of wages, one week's vacation with pay (R. 582), a reduction of the hours of firemen and maintenance men (R. 708), and the adjustment of piece-work rates and overtime rates (R. 706). The term of the proposed contract was settled at three years (R. 584).

The wage scale, reflecting the 5% increase, was inserted in the contract (R. 852) and such wage scale could not be reduced by the employer until July 10th, 1938, although it could be voluntarily increased before that time (R. 855). If changes in hours, wages, vacations or working facilities for the year ensuing after July 10th, 1938 could not be satisfactorily settled, disputes on these points were to be submitted to arbitration (R. 856). Strikes and lockouts were prohibited by the contract (R. 854).

After all differences had been settled, the contract was executed by petitioner with the Committee and with each individual employee who wished to become a party thereto, petitioner making it clear to em-

ployees that signing was entirely optional and that continuation of employment was not predicated upon signing the contract (R. 585).

The contracts were distributed to the employees by the Committee, supervisory employees being admonished not to participate under pain of dismissal (R. 588, 589). A large number of contracts, one of which is printed in the record (R. 850-857), were thereupon executed in accordance with the foregoing, but the exact number executed does not appear.

At the hearing, the Board did not produce a single witness to give evidence as to the manner or method in which the employees appended their signatures to the petition of September 9th, 1937 in evidence as Respondent's Exhibit 10 (R. 866a), pursuant to which the employees had repudiated the union as their bargaining agent and substituted in its place their own Committee of eight fellow workers, nor did it produce a single member of that Committee. Out of petitioner's entire employee body, the Board produced only two witnesses who gave some testimony on the subject of the contracts and each witness testified that they had signed voluntarily and without coercion (R. 376; 766; 380-381).

The reason for the lack of any evidence or testimony on this subject is evident. In view of the fact that at the hearing counsel for the union conceded that the charge filed against petitioner did not apply to these contracts (R. 380), and counsel for the Board also conceded that the complaint did not embody them (R. 381), the proceedings were conducted by all parties on the theory that the contracts were not in issue, and that no necessity existed to adduce evidence in respect thereto.

To the proceedings instituted by the Board, only

petitioner was made a party respondent. Neither the Committee nor any one of the numerous employees holding individual contracts with petitioner were given notice of the proceedings or named as parties or served with any charge, summons, notice, complaint or other process, or granted any opportunity to be heard on matters affecting their interests. Not being parties and not receiving any notice whatever, the Committee and the employees took no part in the hearings before the Trial Examiner which were conducted *ex parte* as to them in every respect.

On May 31st, 1938 the Board issued its Decision (R. 867-894) and Order (R. 894-897), whereby petitioner was directed, in substance, to cease and desist from dominating or interfering with the Committee, from giving effect to the contracts, and from refusing to bargain collectively with the union; to affirmatively withdraw recognition from and completely disestablish said Committee; to inform each member thereof, and each of its employees who have signed contracts, that said contracts constituted violations of the National Labor Relations Act and must be, in effect, cancelled; to bargain with the union, and if an understanding is reached, to embody said understanding in an agreement for a definite term upon the union's request, and to post notices in conformity with the foregoing.

In the enforcement proceedings the Circuit Court of Appeals for the Second Circuit rendered a decision (R. 907) and entered an order (R. 914), enforcing the Board's order in all respects against petitioner, except that the requirement of bargaining with the union was conditioned upon the result of an election to be conducted by the Board to determine whether the union was still the representative of the employees.

B.

Jurisdiction.

The jurisdiction of this Court to review the decree in question is based upon Section 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925, c. 229, sec. 1, 43 Stat. 938 (28 U. S. C. A. Sec. 347(a)) and Section 10(e) of the National Labor Relations Act of July 5th, 1935, c. 372, sec. 10, 49 Stat. 453 (29 U. S. C. A. 160(e)) and Section 5, subdivision (b) of Rule 38 of the Revised Rules of this Court.

The decision of the Circuit Court of Appeals for the Second Circuit was rendered June 12th, 1939 (R. 907) and its decree thereon was filed July 6th, 1939 (R. 914).

C.

Questions Presented.

1. Were petitioner's employees necessary parties to, and entitled to notice of the proceedings abrogating and annulling their individual contracts of employment with petitioner?

2. Was the Collective Bargaining Committee of the National Licorice Company, a party to such contracts with petitioner, likewise entitled to notice of said proceedings and the right to be heard thereon?

3. Is the National Labor Relations Board, as an administrative agency of the United States, bound by the statements made upon the hearing by the attorneys for the union and the Board respectively, that

the charge filed against petitioner did not apply to these contracts and that the complaint did not embody them, or could the Board repudiate such statements of counsel and cancel the contracts notwithstanding?

4. Does the National Labor Relations Act confer upon the Board the power, either express or implied, to cancel and destroy an individual contract of employment?

(a) If the Board has such power over individual contracts of employment, may it be exercised despite the fact that in this case not a single employee whose contract was rescinded has requested such result, given his consent thereto, tendered back the benefits received, or even testified on that subject?

(b) Did the Board, in cancelling the contracts in this case, deprive petitioner and its employees of property without due process of law within the meaning of the Fifth Amendment?

5. Can a contract between employer and employee be said to be "in violation of the National Labor Relations Act" or "unlawful", as the Board and the Court below characterized the contracts in this case, when the Act contains no provisions which affect or restrict, in the slightest degree, the common law rights of persons to contract for the sale of their labor on whatever terms they may voluntarily choose, and this Court, in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, 57 S. Ct. 615, 628, interpreted said Act as not precluding such individual contracts as an employer might elect to make directly with individual employees or from hiring individuals on whatever terms he may, by unilateral action, determine?

6. Are the terms of the contracts in violation of the National Labor Relations Act?

7. Is the jurisdiction of the Board limited to the hearing and determination of such unfair labor practices which are embodied within a charge, as provided by Section 10(b) of the Act and Article II, Sections 1, 2, 3, 4, 5 and 9 of the Rules and Regulations of the Board, Series 1, as amended, or does the Board have power to conduct a hearing and make an order respecting matters not included in the charge?

8. Whether the Board made findings on substantial evidence when it gave no heed or effect to the written petition of a large majority of the workers revoking the authority of the union to represent them and designating their own Committee, when there is no proof whatever in the record impeaching the petition in the slightest degree or of even an attempt to challenge its authenticity or validity?

9. Whether the Circuit Court of Appeals made a proper order in directing the Board to conduct an election to determine whether the union still represented a majority of petitioner's employees?

D.

Reasons Relied on for the Allowance of the Writ.

1. The Court below, by giving judicial approval to the proposition that the Board possesses the requisite authority to cancel employment agreements, and in holding that the Committee and the employees, despite their valuable and beneficial interests in the contracts, were not entitled to notice or hearing, has

decided a federal question in a way in conflict with the decision of this Court in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206, 218.

2. The decision rendered by the Court below to the effect that the individual contracts were unlawful is in conflict with decisions of other circuit courts of appeal, and is in conflict with decisions of this Court, rendered in the following cases:

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615;

Consolidated Edison Company v. *National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206;

National Labor Relations Board v. *Delaware-New Jersey Ferry Co.*, 90 Fed. (2d) 520 (C. C. A. 3rd), certiorari denied Nov. 8, 1937;

National Labor Relations Board v. *The Sands Mfg. Co.*, 96 Fed. (2d) 721 (C. C. A. 6th).

3. The Court below, in deciding that the Board has authority to conduct the hearing and make an order with respect to matters not included within the charge, despite the provisions of Section 10(b) of the Act and Article II, Sections 1, 2, 3, 4, 5 and 9 of the Regulations, has decided an important question of federal law which has not been, but should be settled by this Court. Furthermore, the decision of the Court below on this point is squarely in conflict with a decision on the identical point announced in the case of *National Labor Relations Board* v. *Hopwood Retinning Co., Inc.*, 98 Fed. (2d) 97 (C. C.

A. 2nd), which held that the Board's complaint and the hearing must be in accord with the charge and that the Board cannot use its own initiative in respect to charging unfair labor practices. The conflict between these two decisions relating to the extent of the Board's jurisdiction has produced a state of confusion which should be settled by this Court.

4. The Court below has so far sanctioned a departure by the Board from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in that said Circuit Court:

(a) Permitted the Board to disregard and avoid the binding effect of the attorneys' stipulations that the contracts were not in issue.

(b) Permitted the Board to cancel contracts when neither the Committee nor any of the employee parties thereto, excepting two, appeared or testified and there is no evidence whatever in the record as to the employees' desires in the matter.

(c) Permitted the Board to avoid the binding and conclusive legal effect of a written petition signed by over 85% of the employees, received without objection as an exhibit in evidence, pursuant to which the union was ousted and a new bargaining representative selected.

5. The questions presented for determination in this cause are of importance in the administration of the National Labor Relations Act, and are of particular importance to employers and employees throughout the United States.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complet transcript of the record and of all proceedings in this cause, entitled "National Labor Relations Board, Petitioner v. National Licorice Company, Respondent", and that said decree of the Circuit Court of Appeals be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper.

Dated, August 5th, 1939.

NATIONAL LICORICE COMPANY,
Petitioner.

ABRAHAM MANN,
EDWARD M. LADDEN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 104 Fed. (2nd) 655. It was filed June 12th, 1939, and an order or decree thereon was entered July 6th, 1939. The opinion and order are printed at pages 907 to 917 of the record.

The decision, findings of fact and conclusions of law of the National Labor Relations Board are printed at pages 867 to 894 of the record and its order is printed at pages 894 to 897. Said decision, order, etc., is reported in 7 N. L. R. B. 73.

II.

Jurisdiction.

Petitioner seeks a review by writ of certiorari pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925, c. 229, Sec. 1, 43 Stat. 938 (U. S. C. Tit. 28, Sec. 347(a)) and Section 10(e) of the National Labor Relations Act of July 5th, 1935, c. 372, Sec. 10, 49 Stat. 453 (U. S. C. Tit. 29, Sec. 160(e)). The date of the decree sought to be reviewed is July 6th, 1939 (R. 914), and the date of the decision is June 12th, 1939 (R. 907). It was rendered by the United States Circuit Court of Appeals for the Second Circuit in a proceeding instituted therein by the National Labor Relations

Board, pursuant to Section 10(e) of the National Labor Relations Act, for enforcement of its order made against the National Licorice Company.

III.

Statement of the Case.

A full statement of the case has been given under heading A in the petition for the writ of certiorari, and for the sake of brevity is not repeated here.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In not finding and holding that the Committee and each of the employees whose contracts were destroyed by the Board's order were necessary and indispensable parties to, and were entitled to notice of the proceedings and the right to be heard thereon.

(2) In not finding and holding that the Board lacked power or authority to cancel individual contracts of employment, and that under the circumstances existing in this case a cancellation would result in petitioner, its employees, and the Committee being deprived of property without due process of law.

(3) In holding that "the situation was clearly within *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 58 S. Ct. 571, 82 L. Ed. 831, 115 A. L. R. 307, and not within *Consolidated Edison Co.* v. *National Labor Relations*

Board, 305 U. S. 197, 231-239, 59 S. Ct. 206, 83 L. Ed. * * *."

(4) In holding that petitioner, through the contract, was "exacting unlawful concessions" from the Committee.

(5) In not finding and holding that the statement and concession of the attorneys for the Board and the union, made at the hearing to the effect that the contracts were not in issue, was binding upon the Board so as to preclude it from making any order or adjudication respecting such contracts.

(6) In refusing to find and hold that the jurisdiction of the Board is limited to the hearing and determination only of such unfair labor practices that are alleged in a charge, and that the Board cannot adjudicate with respect to matters not so charged.

(7) In failing to find and hold that the Board's order was not based upon substantial evidence and that said order was, in all respects, improper and unlawful.

(8) In ordering the Board to conduct an election to ascertain whether the union still represents the men, in view of the uncontroverted evidence in the record that such union, as far back as September 9th, 1937, was repudiated by the workers and its authority as bargaining agent revoked by the written instrument in evidence as Respondent's Exhibit 10 (R. 866a).

V.

Argument.

POINT I.

There is a conflict between Circuit Court decisions as to the extent of the Board's jurisdiction over matters not included within a charge filed under Section 10(b) of the Act; an important question is thus presented which should be settled by this Court.

Section 10(b) of the Act provides in part as follows:

> "*Whenever it is charged* that any person is engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint *stating the charges in that respect*, * * *." (Italics ours.)

Under the Rules and Regulations of the Board, Series 1, as amended, in Article II, Section 1, it is provided, in substance, that a charge of unfair labor practices may be made by any person or labor organization; such charge may be withdrawn only with the consent of the Regional Director with whom it was filed or of the Board, and upon the withdrawal of any charge the Regional Director shall dismiss any complaint based thereon. Section 2 provides that the charge shall be filed in the Region where the alleged unfair labor practice has occurred or is occurring. Section 3 provides that the charge must be in writing, the original being signed and sworn to, and that there shall be three additional copies of such charge filed. Section 4 provides that the charge shall contain the name and address of the person or labor organization

making the charge, the name and address of the respondent, and a clear and concise statement of the facts constituting the alleged unfair labor practice. Section 5 states that after a charge has been filed, if it appears proper to the Regional Director, he shall issue a formal complaint in the name of the Board *stating the charges,* together with a notice of hearing, *and that a copy of the charge shall be annexed to the complaint.* Section 9 provides that if, after the filing of a charge, the Regional Director declines to issue a complaint, such action may be reviewed by the Board in Washington.

The full text of the Regulations referred to is set forth in the appendix.

Construing Section 10(b) of the Act and the Regulations, the Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Hopwood Retinning Co. Inc.,* 98 Fed. (2d) 97, 101, held:

> "This procedure is required as a prerequisite to the jurisdiction of the Board, and the complaint issued and the subsequent hearing must be in accord with the charge in an attempt to prove or rebut such charges. The Board should be an impartial administrator and must ascertain if there were unfair labor practices as charged. The Board cannot use its own initiative in respect to charging unfair labor practices."

It would appear from the foregoing that the foundation of every proceeding before the Board is the charge, and that the Board's complaint, the hearing thereafter held, and any order thereafter issued, cannot expand or enlarge the charge, but such complaint, hearing and order are limited and confined to the matters alleged in the charge. If the proceedings go beyond the matters charged, they are necessarily void, to such extent.

In the present proceeding the amended charge was sworn to on August 2nd, 1937 (R. 772). Presumably, it was filed the same day, which the Board has never denied. No other, further or additional charges have ever been filed herein. It is conceded that the collective bargaining Committee was organized on September 9th, 1937, and that the contracts were not negotiated until September 10th, 1937 (Board's Decision (R. 881-882)). Obviously, the charge of August 2nd, 1937 could not and did not include matters that occurred in the future.* Petitioner claimed that the cancellation of the contracts and the disruption of the Committee, after the close of the hearings, was unlawful and improper for lack of jurisdiction, and was the result of action taken in disregard of the pronouncement of the Chief Justice in the case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47, 57 S. Ct. 615, 629, that "the Act establishes standards to which the Board must conform."

The decision of the Court below in overruling petitioner's contentions on this point, stated that here no charge could have included the "company union" *and it was not necessary that it should* (R. 913), thereby causing an irreconcilable conflict with the decision in the *Hopwood* case cited above. Hence, on an extremely important aspect of the Board's jurisdiction there now exists uncertainty and confusion to a marked degree. The question presented has never been passed upon by this Court, and should now be authoritatively settled by it.

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*The reference in the charge of August 2nd, 1937 to individual contracts and to committees, according to the evidence, related only to a purported attempt in July, 1937 to form a committee and negotiate contracts, which, however, never materialized and the Board made no order with respect thereto.

POINT II.

The decision of the Court below that neither the Committee nor petitioner's employees were entitled to notice and hearing of the proceedings which resulted in cancellation of their contracts is in conflict with the rule announced in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, and other cases decided by this Court.

Petitioner contended before the Circuit Court that the Committee and each employee party to the contract were indispensable parties to the proceedings and entitled to legal notice thereof in view of the invalidation of their contracts. Nevertheless, the opinion of the Court is silent on this fundamental question, except insofar as the Court held "the situation was within the *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 58 S. Ct. 571, 82 L. Ed. 831, 115 A. L. R. 307, and not within *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 231-239, 59 S. Ct. 206, 83 L. Ed. , and the company union could be displaced without being made a party", a statement which demonstrates beyond doubt that the Court below misapprehended the basic nature of the questions presented.

Petitioner never claimed, and does not now claim that a labor organization dominated by the employer is entitled to notice of the proceedings which culminate in the employer being required to cease recognizing or supporting it. The rule to the contrary was announced by this Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. But in that case no question of contract

was involved, and later the application of that rule in a case involving contract rights was forbidden (*Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197). The Circuit Court, however, treated all petitioner's arguments on the subject of lack of notice as though applicable only to the disestablishment of the Committee as a bargaining organization, and, in its opinion, made no reference to the rights of the Committee and the employees to notice and hearing of proceedings insofar as their contracts were involved.

Here we have a contract executed with the Committee, and with employees who executed individual counterparts of such contracts. The benefits received by the employees under the contracts, such as the maintenance of an irreducible wage scale, vacations with pay, extra compensation for overtime, arbitration of disputes and the prohibition of strikes and lock-outs, are substantial property rights in a constitutional sense (*Coppage* v. *Kansas,* 236 U. S. 1; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206, 220), which are personal to each employee and may be individually enforced by him.

That the Committee and the employees were entitled to legal notice and hearing and were indispensable parties to the proceeding was settled definitely by the ruling of this Court in the *Consolidated Edison* case (305 U. S. 197, 59 S. Ct. 206, 218), as follows:

> "The Brotherhood and its locals contend that they were indispensable parties and that in the absence of legal notice to them or their appearance, the Board had no authority to invalidate

the contracts. The Board contests this position, invoking our decision in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. That case, however, is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of Section 8(2). The statement that the 'Association' so formed and controlled was not entitled to notice and hearing, was made in that relation. Id., pp. 262, 270, 271. It has no application to independent labor unions such as those before us. *We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside.* *Russell* v. *Clark's Executors*, 7 Cranch 69, 96; *Mallow* v. *Hinde*, 12 Wheat. 193, 198; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235; *Garzot* v. *de Rubio*, 209 U. S. 283, 297; *General Investment Co.* v. *Lake Shore Railway Co.*, 260 U. S. 261, 285. The rule, which was applied in cases cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here. See *Mallow* v. *Hinde*, *supra*." (Italics ours.)

The Board may attempt to distinguish the *Consolidated Edison* case by pointing out that there the labor organization involved was found by it not to be dominated or controlled by the company, whereas in this case the reverse is true. But this Court did not say that a company-dominated union is *not entitled* to legal notice and hearing when that union also possesses contract rights. The basis of the ruling in the *Pennsylvania Greyhound* case was that the order did

not run against the company union and its presence was not necessary for appropriate action by the Board. That reason, under the principle of the *Consolidated Edison* case, cannot apply to a situation where the property rights of all parties to a contract are terminated by the Board's order.

If, however, this Court will ultimately decide that notice to the labor organization, under such circumstances, need not be given, the individual employees, each of whom are also parties to the contracts are obviously in an entirely different category. Unquestionably under the rule of the Consolidated Edison case they must receive notice and hearing despite the disability under which their bargaining representative may suffer. Such disability of company control, if it should exist, cannot deprive employees who themselves are under no such disability of the constitutional right to notice and hearing of proceedings vitally affecting their interests.

In *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 381, 81 L. ed. 289, 293, this Court said:

> "It is conceded, and rightly so, that the district court was without personal jurisdiction of the defendant, and that in the absence of such jurisdiction the court was without power to proceed to an adjudication. * * * In this instance the dispute or controversy was not properly within the jurisdiction of the district court unless * * * (3) the defendant was before the court by reason of a general appearance or a valid service of process. Each of these elements of jurisdiction was essential, and if any was wanting there was an absence of proper jurisdiction. The defendant was not before the court, and therefore it was without jurisdiction to proceed with the suit. Counsel

for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit *in personam,* such as the one now under discussion, is an essential element of the jurisdiction of a district (formerly circuit) court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication."

In 21 Corpus Juris, Equity, Sec. 277, page 282, it is said:

> "All the parties to a contract are ordinarily indispensable parties to a bill in equity for its enforcement, or for its rescission and cancellation, or reformation, or to enjoin its performance or its breach, particularly where they have joint or common rights or liabilities. The rescission of an agreement requires the presence of all claiming property through such agreement."

At page 273 the following appears in reference to indispensable parties:

> "This class includes all persons who have an interest in the controversy of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Accordingly, persons whose interests will necessarily be affected by any decree that can be rendered are necessary and indispensable parties, and the Court will not proceed to a decree without them."

Continuing, at page 277, appears the following:

> "The principle underlying the rule as to indispensable parties is fundamental and underlies the administration of justice in all courts of equity. It is that no proceedings shall take place with respect to the rights of any one, except in his presence. The rule as to indispensable parties is neither technical nor one of convenience, but is of imperative obligation."

POINT III.

The cancellation of the contracts was effected without due process of law in view of the stipulation of counsel that such contracts were not in issue.

At the hearing, while a witness was being cross-examined, the following colloquy (R. 380-381) took place between Mr. Sklar, attorney for the Union, Mr. Graham, attorney for the Board, Mr. Mann, attorney for the company, and the Trial Examiner:

> "Mr. Sklar: Objected to, Mr. Examiner, on the ground that **this charge applied to August 2nd and has nothing to do with the contract of September 20th.**
>
> Mr. Mann: It talks about individual contracts, and they offered in evidence a contract.
>
> Mr. Sklar: Those contracts referred to are the ones mentioned by Mr. Sanford on July 29th.
>
> Mr. Graham: **In order to get the right effect, we are going to let these in. Complaint embodies none of these contracts.**
>
> Mr. Mann: May I ask on the record whether they want to go into this question of contracts under their amended charge. If not, let's forget about it.
>
> (482) Trial Examiner Korey: I have ruled you can ask the question. Please continue."

The contract of September 20th referred to by Mr. Sklar appears in the record as Board's Exhibit 10 (R. 851-857) (admitted R. 385), and is a facsimile of the many contracts executed during the period from September 10, 1937 to September 20, 1937.

Petitioner was entitled to and did rely upon the statements of counsel quoted above, and of course, conducted its defense thereafter as if the contracts were not in issue. Though petitioner submitted the evidence of one witness, Walter J. Healey, an officer of petitioner, on the subject of how the contracts were negotiated, such testimony was incidental and introduced only for the purpose of revealing the character of petitioner's dealings with the Committee. If petitioner had not been misled, it would have conducted its case in an entirely different manner. Its attorney would have cross-examined the Board's witnesses thoroughly on the subject of the contracts and called as witnesses each employee who signed a contract, as he offered to do before the stipulation was received (R. 378), as well as each member of the Committee and certain officers to testify on all the facts surrounding the same. None of these things were done, because it was believed that no necessity existed therefor.

The conclusion is irresistible that the vitiation of the contracts in this case was either the product of a deliberate purpose by the Board not to reveal its claims and intentions with respect to the contracts, or that its determination to void them was an afterthought conceived and executed without notice or opportunity of hearing. In either event, there was not due process of law.

> "The maintenance of proper standards on the part of administrative agencies in the perform-

ance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Morgan v. *U. S.*, 304 U. S. 1, 22, 58 S. Ct. 773, 778.

POINT IV.

The recognition by the Circuit Court of the existence of authority in the Board to pass upon and supervise the terms of an employment agreement conflicts with the decision of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1.

The Circuit Court enforced the Board's order cancelling the contracts and we gather from the opinion (R. 911), that the contract was deemed unlawful by it for two reasons which may be summarized as follows:

(1) That the stipulation of the employees and the Committee (R. 854) not to propose changing to a closed shop or to demand a signed contract with any union is unlawful for the reason that "the right to propose the change is secured by statute as part of the right to negotiate" (R. 911).

(2) The right of a discharged employee to submit to the employer facts indicating that his discharge was unreasonable (R. 855) "suggests that the company union shall not act for him" (R. 911).

The effect of the decision of the Court below on this point is to give judicial assent to the proposition that the Board has power to scrutinize and adjudicate on the terms of an individual contract between employer and employee, in disregard of the holding of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 45, 57 S. Ct. 615, 628, as follows:

> "It was taken 'to prohibit the negotiation of labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees'. We think this construction also applies to Section 9(a) of the National Labor Relations Act.
>
> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine'."

To the same effect see:

> *National Labor Relations Board* v. *The Sands Mfg. Co.*, 96 Fed. (2d) 721 (C. C. A. 6th);
> *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.*, 90 Fed. (2d) 520 (C. C. A. 3rd), certiorari denied Nov. 8th, 1937.

Apart from this, the invalidity of the Circuit Court's objections to the contract is easily demonstrated. The right of a discharged employee to submit to the employer facts indicating that his discharge was unreasonable is expressly secured by Section 9(a) of the Act,* which provides that any individual employee or group of employees shall have the right at any time to present grievances to their employer.

The other objection is equally without merit. It is entirely true that under the statute employees, through their chosen representatives, have the right to bargain collectively, or, as the Court below said, have the "right to negotiate". But the right to negotiate under the statute is futile and meaningless unless considered as a means to an end, namely, the consummation of an agreement. The Act contemplates the making of contracts with labor organizations. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197. Such contracts must, by their very nature, definitely fix and establish the respective rights, duties and obligations of the parties with that degree of finality which is the underlying reason for entering into contractual relationships. To the extent that employees agree with their employer on any one point they say in effect, "We will negotiate no further on this, since it is settled for the duration of our agreement", and such arrangements are encouraged, rather than precluded, by the policy of the Act. The waiver by employees of the requirement of a closed shop or a signed agreement with any particular type of union, is, of course, not prohibited by the Act.

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* See Appendix.

POINT V.

By enforcing the Board's order cancelling the contracts, the court below gave judicial approval to the proposition that the Board possesses such power, thereby creating a conflict with the decision of this Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197.

In *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206, 219, on the subject of the invalidation of contracts, this Court held:

> "Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of Section 10(c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act'. We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."
>
> "The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of

the Act. The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence or violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices. Compare *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra.* Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective."

POINT VI.

The finding of domination over the Committee reached in this case was not based on substantial evidence; other Circuit Courts have declared similar factual situations to be no evidence of domination.

In the petition for the writ annexed hereto, there is a narration of those events which culminated in the signing of the petition (R. 866a) by the employees, said petition having been admitted into evidence without objection (R. 575). That petition, dated September 9th, 1937, and signed by 118 out of about 140 employees, is clear and specific. It notifies the management of the election of a committee of eight persons as the employees' representatives for collective bargaining, and that the authority vested in that committee "supersedes any authority that any of the undersigned may have given to any other group, organization or individual, and that no one except

the collective bargaining committee consisting of our fellow workers is authorized to represent us in collective bargaining."

Upon the execution of this document on September 9th, 1937, the Bakery & Confectionery Workers International Union lost its status of exclusive bargaining agent and in its place the committee was empowered to bargain collectively with petitioner on behalf of the employees. Section 9(a) of the National Labor Relations Act.

The Board, however, refused to take the petition seriously, or, apparently, to believe it possible that employees would voluntarily sever their connection with the union, even though the union's benefactions to the employees thus far had consisted in the carrying on of a strike and in compelling them to march on picket lines for over three weeks (R. 526) without payment of strike benefits (R. 129). But notwithstanding the suspicions with which the Board may regard this document, it must base any conclusion it reaches on the subject only on substantial evidence. *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142, 147; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197. *Prima facie,* the petition ousted the union from its role as bargaining agent, with the committee supplanting the union; *and the burden of proving otherwise rested on the Board. National Labor Relations Board* v. *A. S. Abell Co.,* 97 Fed. (2d) 951 (C. C. A. 4th).

A like situation in which employees circulated a petition and organized a committee to represent them in dealings with their employer was presented in

National Labor Relations Board v. *A. S. Abell Co.*, 97 Fed. (2d) 951, 957 (C. C. A. 4th). The Court held:

> "There is, however, no justification for the position that spontaneous action on the part of the men is so improbable as to warrant the inference that it was inspired by the management."

If the Board suspected that the Committee was dominated by petitioner, or that the latter had a hand in its formation, the logical witnesses to prove these facts, if such facts existed, would naturally be those persons who composed the Committee as well as those 118 employees who signed the petition. Yet, the indisputable fact remains that not one of such persons was called or gave any testimony at the hearing, and there is not a shred of evidence in the record which indicated, at the hearing, that the validity of the petition as an expression of the workers' choice was ever assailed or impeached in the slightest degree. The proof was all the other way, since it was not denied that the first impulse for the formation of the Committee came from employees who were "fed-up" with the union (R. 526); that petitioner refused to deal with them unless a majority of the employees signified their assent; and that when petitioner's President dictated the form of the petition, *he did so at the request of the employees* (R. 576).

In the case of *National Labor Relations Board* v. *Lion Shoe Company*, 97 Fed. (2d) 448 (C. C. A. 1st), the situation was quite similar to the one at bar. Employees had approached the management and asked if it would deal with them if they formed "an independent, legitimate labor union with representatives of all departments in the factory represented". After

a conference, contracts were typed in the office of the employer. The Court held, at page 454:

> "The fact that it was finally typed in the office of the respondent is also suggested in the Board's decision as evidence of domination by the respondent, *which discloses the limits to which the Examiner and the Board went in drawing conclusions of domination.* Obviously no weight could possibly be properly given to these facts as showing domination." (Italics ours.)

and at page 458:

> "* * * there would appear to be nothing in the Act that prevents an employer from entering into an agreement with a labor organization formed of old employees, on whatever terms may be agreed upon, *no unfair labor practice being used or domination shown.*"

The Board, in its decision, ordered petitioner to bargain with Bakery & Confectionery Workers International Union (R. 895, 896), thereby giving no heed or effect to the employees' views, as evidenced by the petition. The Circuit Court, however, did not go so far. It ordered an election to determine whether the union is still the representative of the majority of the employees, but in so doing it likewise gave no effect to the petition. The authenticity of that petition could only be impugned by substantial evidence (not by trivialities such as typing in petitioner's office) before it could be disregarded. In the absence of such substantial evidence the Board and the Court below were bound, for judicial purposes, to give effect to this uncontroverted written exhibit according to

its terms (*Chesapeake & Ohio R. R. Co.* v. *Martin*, 283 U. S. 209), and the failure so to do warrants a review by this Court.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers under the authority hereinabove cited, and that to such end a writ of certiorari should be granted and this Honorable Court should review the decision of the United States Circuit Court of Appeals for the Second Circuit, and finally reverse it.

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On the Brief.

Appendix.

Applicable Provisions of the National Labor Relations Act

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to Section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all

the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

"SEC. 10.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling."

Applicable Provisions of the Rules and Regulations of the Board, Series 1, as Amended and Effective April 27th, 1936 (1 L. R. R. Manual 814)

ARTICLE II.

Procedure Under Section 10 of the Act for the Prevention of Unfair Labor Practices

Charge

"Section 1. A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person or labor organization. A charge may be withdrawn only with the consent of the Regional Director with whom such charge was filed or of the Board. Upon withdrawal of any charge, the Regional Director shall dismiss any complaint based thereon.

"Sec. 2. Except as provided in Section 37 of this Article, such charge shall be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more Regions may be filed with the Regional Director for any of such Regions.

"Sec. 3. Such charge shall be in writing, the original being signed and sworn to before any notary public or any agent of the Board authorized to administer oaths or acknowledgments. Three additional copies of such charge shall be filed. A blank form for making a charge will be supplied by the Regional Director upon request.

"Sec. 4. Such charge shall contain the following:

(a) The full name and address of the person or labor organization making the charge.

(b) The full name and address of the person against whom the charge is made (hereinafter referred to as the 'respondent').

(c) A clear and concise statement of the facts constituting the alleged unfair labor practice affecting commerce, particularly stating the names of the individuals involved and the time and place of occurrence.

"Sec. 5. After a charge has been filed, if it appears to the Regional Director that a proceeding in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the 'parties to the proceeding') a formal complaint in the name of the Board stating the charges and containing a notice of hearing before a Trial Examiner at a place therein fixed and at a time not less than five days after the service of the complaint. A copy of the charge shall be attached to the complaint.

"Sec. 9. If, after the charge has been filed, the Regional Director declines to issue and cause to be served a complaint, the person or labor organization making the charge may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the Regional Director.

"Sec. 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge to be filed with it, in Washington,

D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to Section 2 of this Article, order that such charge, and any proceedings which may have been instituted in respect thereto—

(a) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

(b) be consolidated for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region; or

(c) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in or transferred to such other Region, or for any other purpose.

The provisions of Sections 3 to 31, inclusive, of this Article shall, in so far as applicable, apply to proceedings before the Board pursuant to this Section, and the powers granted to Regional Directors in such provisions shall, for the purpose of this Section, be reserved to and exercised by the Board. After the transfer of any charge and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to this Section, the provisions of Sections 3 to 36, inclusive, of this Article, shall apply to such charge and such proceeding as if the charge had ogiginally been filed in the Region to which the transfer is made."